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UNITED STATES OF AMERICA POSTAL REGULATORY COMMISSION WASHINGTON, DC 20268-0001

Before Commissioners: Ruth Y. Goldway, Chairman;

Robert G. Taub, Vice Chairman;

Mark Acton;

Tony Hammond; and Nanci E. Langley

Complaint of Mid-Hudson Area Local Docket No. C2013-3

and Consumers of USPS

Complaint of Bakersfield Area Local Docket No. C2013-4

and Consumers of USPS

Complaint of Red Bank Area Local Docket No. C2013-5

and Consumers of USPS

Complaint of Greater East Texas Area Local Docket No. C2013-6

and Consumers of USPS

Complaint of Tyler, TX Local #1477 Docket No. C2013-7

and Consumers of USPS

Complaint of APWU Helena Local 649 Docket No. C2013-8

and Consumers of USPS

Complaint of Brooklyn, N.Y. Local 251 Docket No. C2013-9

and Consumers of the USPS

ORDER DISMISSING COMPLAINTS

(Issued June 26, 2013)

I. INTRODUCTION

On April 8, 2013, the Mid-Hudson Area Local of the American Postal Workers Union (Mid-Hudson Area Local) filed a complaint alleging violations by the Postal Service of 39 U.S.C. §§ 101(d), 3691, and section 302 of the Postal Accountability and Enhancement Act of 2006. The alleged violations relate to the Postal Service's accelerated closure and consolidation of certain mail processing plants. Between April 8, 2013 and April 19, 2013, six additional complaints were filed that were substantially similar. For convenience, citations in this order refer to the complaint of the Mid-Hudson Area Local filed in Docket No. C2013-3.

¹ Complaint of Mid-Hudson Area Local & Consumers Regarding Failure to Revise and Update Information to the Union & Consumers on the AMP Study for Mid-Hudson P. & D. Center, April 8, 2013 (Complaint).

² Pub. L. No. 109-435, 120 Stat. 3198 (Dec. 20, 2006) (PAEA).

³ Docket No. C2013-4, Complaint of Bakersfield Area Local & Consumers Regarding Failure to Revise and Update Information to the Union & Consumers on the AMP Study for Bakersfield P.&.D Center, April 8, 2013; Docket No. C2013-5, Complaint of Red Bank Area Local and Consumers Regarding Failure to Revise and Update Information to the Union & Consumers on the AMP Study for Monmouth Processing and Distribution Center, April 9, 2013; Docket No. C2013-6, Complaint of Greater East TX Area Local & Consumers Regarding Failure to Revise and Update Information to the Union & Consumers on the AMP Study for East TX P&DC, April 10, 2013; Docket No. C2013-7, Complaint of Tyler TX Local #1477 & Consumers Regarding Failure to Revise and Update Information to the Union & Consumers on the AMP Study for East Texas P.& D. Center, April 10, 2013; Docket No. C2013-8, Complaint of APWU Helena MT Local & Consumers Regarding Failure to Revise and Update Information to the Union & Consumers on the AMP Study for Helena CSPDC, April 11, 2013; and Docket No. C2013-9, Complaint of Brooklyn NY Local and Consumers Regarding Consolidation AMP for June 2013, April 19, 2013. The parties are collectively referred to as "Complainants", and their complaints are collectively referred to as "Complaints".

The Postal Service moved to dismiss each of the Complaints.⁴ The motions to dismiss were the same in all material respects. For convenience, citations in this order refer to the motion to dismiss filed in Docket No. C2013-3 (Motion to Dismiss).

The Mid-Hudson Area Local and the Bakersfield Area Local filed oppositions to the motion to dismiss that were substantially similar. They requested that the Commission deny the motions to dismiss filed in Docket Nos. C2013-3 through C2013-9. Mid-Hudson Response at 20; Bakersfield Response at 18. For convenience, citations in this Order refer to the response filed by the Mid-Hudson Area Local.

Because the pleadings are the same in all material respects, this Order addresses all issues and claims raised in Docket Nos. C2013-3 through C2013-9. For the reasons set forth below, the Commission grants the Motions to Dismiss.

II. BACKGROUND

On September 21, 2011, the Postal Service published an advance notice of proposed rulemaking that invited comments on a proposal to revise service standards for market dominant products. The proposal involved eliminating the expectation of overnight service for First-Class Mail and Periodicals. *Id.* For each of these classes, the two-day delivery range would be narrowed, and the three-day delivery range would be enlarged. *Id.*

⁴ Motion of the United States Postal Service to Dismiss Complaint, April 29, 2013; Docket No. C2013-4, United States Postal Service Motion to Dismiss Complaint, April 29, 2013; Docket No. C2013-5, Motion of the United States Postal Service to Dismiss Complaint, April 29, 2013; Docket No. C2013-6, Motion of the United States Postal Service to Dismiss Complaint, April 30, 2013; Docket No. C2013-7, Motion of the United States Postal Service to Dismiss Complaint, April 30, 2013; Docket No. C2013-8, United States Postal Service Motion to Dismiss Complaint, May 1, 2013; and Docket No. C2013-9, Motion of the United States Postal Service to Dismiss Complaint, May 9, 2013.

⁵ Response in Opposition to Motion to Dismiss, June 3, 2013 (Mid-Hudson Response); Docket No. C2013-4, Complainant's Motion in Opposition to the United States Postal Service Motion to Dismiss Complaint, June 3, 2013 (Bakersfield Response).

⁶ Proposal to Revise Service Standards for First-Class Mail, Periodicals, and Standard Mail, 7 FR 58433 (Sept. 21, 2011).

One major effect of the proposal would be to "facilitate a significant consolidation of the Postal Service's processing and transportation networks." *Id.* The Postal Service explained that it experienced significant financial losses for the previous 4 years due to sharp revenue declines associated with falling volumes, as well as other statutorily-mandated costs. *Id.* at 58434. It stated that further network consolidations are necessary to align the Postal Service's infrastructure with current and projected mail volumes and to bring operating costs in line with revenues. *Id.* However, it noted that these consolidations would largely be unachievable without the relaxation of certain service standards. *Id.* It concluded that relaxed service standards would enable it to consolidate mail processing operations from over 500 locations to fewer than 200 locations, which would result in lower facilities costs and significant labor workhour savings. *Id.* at 58435.

The Postal Service stated that if it decided to move forward with its proposal, it would solicit public comments on a proposed rule and would request an advisory opinion from the Commission. *Id.* at 58435-36. On December 5, 2011 the Postal Service filed its request for an advisory opinion with the Commission pursuant to 39 U.S.C. § 3661(b).⁷ The Request informed the Commission that the Postal Service was conducting a parallel notice and comment rulemaking to revise the service standards. *Id.* at 7. On December 7, 2011, the Commission established Docket No. N2012-1 to consider the Request.⁸

On December 15, 2011, the Postal Service published proposed revisions to its market dominant service standards in the *Federal Register* and sought public comments.⁹ On May 17, 2012, the Postal Service issued a press release announcing

⁷ Docket No. N2012-1, Request of the United States Postal Service for an Advisory Opinion on Changes in the Nature of Postal Services, December 5, 2011 (Request).

⁸ Order No. 1027, Docket No. N2012-1, Notice and Order Concerning Request for an Advisory Opinion Regarding the Revision of Service Standards for First-Class Mail, Periodicals, Package Services, and Standard Mail, December 7, 2011.

⁹ Service Standards for Market-Dominant Mail Products, 76 FR 77942 (December 15, 2011).

its intention to implement new service standards for market dominant products and consolidate its network of mail processing location in two phases. ¹⁰ Phase One would result in up to 140 consolidations through February 2013 while maintaining overnight service for First-Class Mail designated as Intra-SCF. *Id.* Phase Two would result in up to 89 consolidations beginning in February 2014 "[u]nless the circumstances of the Postal Service change in the interim[.]" *Id.*

On May 25, 2012, the Postal Service published a final rule revising service standards for market dominant mail products.¹¹ From July 2012 through September 2012, the Postal Service closed or consolidated 46 mail processing plants as part of Phase One. Motion to Dismiss at 3. On September 28, 2012, the Commission issued its advisory opinion concerning the Postal Service's network rationalization plan.¹²

During Phase One, the Postal Service determined that certain mail processing plant closures or consolidations originally scheduled for Phase Two could be implemented during Phase One while preserving the service standards that took effect in July 2012. *Id.* On January 14, 2013, the Postal Service issued a statement announcing that the "Board of Governors has directed management to accelerate the restructure of Postal Service operations to further reduce costs in order to strengthen Postal Service finances." Specifically, the Board of Governors approved restructuring initiatives and instructed the Postal Service to revise its 2012 5-year comprehensive plan to account for current financial and liquidity conditions. *Id.*

¹⁰ Postal Service Moves Ahead with Modified Network Consolidation Plan, May 17, 2012, reprinted in Docket No. N2012-1, Tr. 9/2713-14. The announcement represented a modification of the Postal Service's initial proposal.

¹¹ Revised Service Standards for Market-Dominant Mail Products, FR 77 31190 (May 25, 2012).

¹² Docket No. N2012-1, Advisory Opinion on Mail Processing Network Rationalization Service Changes, September 28, 2012.

¹³ Statement from the United States Postal Service: Board of Governors Directs Postal Service Management to Accelerate (January 14, 2013), *available at http://about.usps.com/news/speeches/2013/pr13_pmg0114.htm*.

On March 26, 2013, the Postal Service notified leaders of various postal unions, including APWU National President Cliff Guffey, that the Postal Service decided to advance the closing and consolidation for 53 mail processing plants originally scheduled for Phase Two to Phase One. 14 On March 28, 2013, the Postal Service sent another letter to the unions that two additional locations would be moved from Phase Two to Phase One. 15 The letters explained that the accelerated implementation schedule for the 55 mail processing plants would still permit the Postal Service to maintain the Phase One interim SCF service standard. See APWU Letter at 1. The Mid-Hudson Processing and Distribution Center is one of the mail processing plants whose consolidation is being advanced from Phase Two to Phase One. Motion to Dismiss at 5.

III. PROCEDURAL HISTORY

The Complaints were filed between April 8, 2013 and April 19, 2013. The Postal Service moved to dismiss each complaint. Under the Commission's rules, responses to the Motions to Dismiss were due within 7 days of the motion's filing. See 39 C.F.R. § 3001.21(b).

On May 16, 2013, the Mid-Hudson Area Local filed a motion for late acceptance and requested an extension to respond to the Motion to Dismiss. ¹⁶ On May 21, 2013, the Commission issued an order granting an extension of time to respond to the Motion

¹⁴ See Letter from Patrick Devine, Manager, United States Postal Service, to Cliff Guffey, President, American Postal Workers Union, March 26, 2013, *reprinted in* Exhibit A at 5 (APWU Letter).

¹⁵ Letter from Patrick Devine, Manager, United States Postal Service, to Cliff Guffey, President, American Postal Workers Union, March 28, 2013.

¹⁶ Mid-Hudson Area Local Motion to File Late Acceptance and Requesting an Extension to Respond to Motion to Dismiss, May 16, 2013.

to Dismiss.¹⁷ On June 3, 2013, the Mid-Hudson Area Local and the Bakersfield Area Local filed oppositions to the motions to dismiss.¹⁸

IV. SUMMARY OF PLEADINGS

A. Mid-Hudson Area Local's Complaint

Complainants allege violations of 39 U.S.C. §§ 101(d), 3691, and section 302 of the PAEA. The Complaint is based on two main arguments. First, Complainants argue that the Area Mail Processing (AMP) studies for the 55 mail processing plants being moved from Phase Two to Phase One have not been revised and updated, and therefore do not reflect proper savings estimates resulting from changed conditions at the processing plants. Mid-Hudson Response at 8; Complaint at 2.

Second, Complainants assert that the Postal Service failed to provide documentation showing the actual costs and effects of consolidating the plants, as well as unredacted copies of the AMP studies conducted 2 to 4 years ago. Mid-Hudson Response at 8. Complainants contend that the Postal Service is basing its decision to accelerate closure of the mail processing plants on inaccurate data and cost savings estimates. *Id.* at 4.

The remedy requested is for the Commission to use its enforcement tools and direct the Postal Service to cease implementation of the accelerated closure of the 55 mail processing plants. Complaint at 2, 4. Complainants also request the Commission to direct the Postal Service to conduct new AMP studies to replace the outdated ones. *Id.*

B. Postal Service's Motion to Dismiss

¹⁷ Order No. 1722, Order Granting Extension of Time to Respond to Motion to Dismiss, May 21, 2013. The Commission issued similar orders in Docket Nos. C2013-4 through C2013-9.

¹⁸ The next day, the Mid-Hudson Area Local filed a Motion to Request an Extension to Submit a Copy of the Documents That Go to Latest Response, June 4, 2013. The motion is granted.

The Postal Service argues that the Commission lacks jurisdiction to hear the Complaint. Motion to Dismiss at 8. It contends that the Complaint fails to properly allege any statutory or regulatory violations that give rise to the Commission's complaint jurisdiction. *Id.* at 8-11. The Postal Service claims that the Commission lacks jurisdiction over matters relating to labor relations and section 302 of the PAEA. *Id.* at 11-15. It also states that Complainants failed to attain jurisdiction under section 101(d) or chapter 36 of title 39, and the Commission lacks complaint jurisdiction to review AMP studies or individual mail processing and distribution center closings or consolidations. *Id.* at 16-18.

The Postal Service also argues that the Complaint fails to raise any issues of material fact or law. *Id.* at 18. It states that allegations regarding the sufficiency of AMP studies and failure to provide unredacted copies of these studies are unsupported by the record. *Id.* at 18-27. The Postal Service contends that 39 U.S.C. § 3661 does not require it to provide Commission notice of its decision to accelerate implementation of specific mail processing plant closings and consolidations. *Id.* at 28-29.

Alternatively, the Postal Service argues that Complainants did not satisfy procedural requirements of 39 C.F.R. § 3030.10(a). *Id.* at 29. It contends that Complainants did not meet and confer with the Postal Service's General Counsel. *Id.* at 29-33. It asserts that the issues presented in the Complaint were previously resolved by the Commission in Docket No. N2012-1. *Id.* at 33-35.

C. Response to Motion to Dismiss

Complainants claim they clearly identified and explained how the Postal Service's action violates applicable statutory standards or regulatory requirements, including section 302 of the PAEA. Mid-Hudson Response at 5. They differentiate the instant Complaint from Docket No. N2012-1 and assert that they have discussed the Complaint with the Postal Service General Counsel. *Id.* at 5-6. They argue that the Commission has jurisdiction to hear the Complaint because the Commission has broad regulatory

oversight related to Postal Service service standards and service performance. Mid-Hudson Response at 7, 12-13.

V. COMMISSION ANALYSIS

A. 39 U.S.C. §§ 101(d) and 3691

Complainants allege violations of 39 U.S.C. §§ 101(d) and 3691. For the reasons discussed below, the Commission finds that Complainants fail to establish any legally cognizable nexus between the alleged violations and these statutory provisions.

1. Section 101(d)

Complainants assert that the Postal Service is not operating in conformance with the requirements of the provisions of 39 U.S.C. § 101(d). Mid-Hudson Response at 4. Specifically, Complainants argue that failing to revise the AMP studies after changes have occurred violates section 101(d). Complaint at 2.

39 U.S.C. § 101(d) embodies the policy that "Postal rates shall be established to apportion the costs of all postal operations to all users of the mail on a fair and equitable basis." The Complaint merely includes references to section 101(d) (see, e.g., Complaint at 4) without any discussion of why that section may bear on the issues raised by the Complaint. Moreover, Complainants do not allege that failing to revise the AMP studies affects postal rates or the fair and equitable apportionment of costs of postal operations.

The Commission's complaint rules require a complaint to "[c]learly identify and explain how the Postal Service action or inaction violates applicable statutory standards or regulatory requirements including citations to the relied upon section or sections of title 39, order, regulation, or other regulatory requirements[.]" 39 C.F.R. § 3030.10(a)(2). Complainants have not explained how the revision of AMP feasibility studies relates to section 101(d), which involves postal rates. In sum, none of the allegations raised by Complainants relate to section 101(d). Therefore, to the extent the

Complaint alleges a violation of section 101(d), that element of the Complaint is dismissed.

Section 3691

Complainants argue that the Postal Service's failure to provide them unredacted copies of completed AMP feasibility studies with supporting data violates 39 U.S.C. § 3691. Complaint at 2. In their Response, Complainants contend that they "clearly identified and explained how the USPS's action violates applicable statutory standards or regulatory requirements, including Title 39 Chapter 3691 sec. 302 of the Postal Service Plan of the PAEA." Mid-Hudson Response at 5.

Complainants' claims concerning the availability of unredacted copies of AMP feasibility studies are unrelated to section 3691, which concerns the establishment of modern service standards for market dominant products. Service standards were set pursuant to section 3691, which authorizes the Postal Service to revise such regulations from time to time. As noted above, the Postal Service sought an Advisory Opinion concerning the change in service standards accompanying its network rationalization plan.

Again, Complainants have failed to demonstrate any nexus between section 3691 and their alleged claims that gives rise to any recognizable jurisdictional claim before the Commission. Therefore, to the extent the Complaint alleges a violation of section 3691, that element of the Complaint is dismissed.

B. Section 302 of the PAEA

Complainants' principal claim is that the Postal Service failed to follow the procedures set forth in section 302 of the PAEA. See Complaint at 2-3. For reasons discussed below, that claim is not jurisdictional under 39 U.S.C. § 3662.

An interested person may bring a complaint case before the Commission if the person believes that "the Postal Service is not operating in conformance with the

requirements of the provisions of sections 101(d), 401(2), 403(c), 404a, or 601, or this chapter [chapter 36 of title 39, United States Code] (or regulations promulgated under any of these provisions)." 39 U.S.C. § 3662.

Complainants allege that the Postal Service has violated various provisions of section 302 of the PAEA. ¹⁹ Complaint at 2. The threshold issue raised by this claim is whether section 302 of the PAEA can be construed as part of chapter 36. Although section 302 of the PAEA appears as a Historical and Statutory Note to 39 U.S.C. § 3691, section 302 is not itself a provision of chapter 36 of title 39, United States Code. As discussed below, this conclusion is supported by the text of the PAEA and is consistent with the treatment Federal courts have extended to provisions contained in Historical and Statutory Notes. Therefore, the Commission dismisses that element of the Complaint for lack of jurisdiction.

The current edition of the United States Code (Code) serves as *prima facie* evidence of the laws of the United States, but it is not itself legal evidence of those laws. 1 U.S.C. § 204(a). Generally, only the United States Statutes at Large are considered "legal evidence of laws." 1 U.S.C. § 112. The exception to this general rule occurs when a title of the United States Code is enacted into positive law. At that point, the title is considered "legal evidence of the laws therein contained." *Id.* Title 39, United States Code, was enacted into positive law by the Postal Reorganization Act, Public Law 91-375, 84 Stat. 719, and it now serves as legal evidence of the laws of the United States. However, it is not clear that a Historical and Statutory Note to title 39 can be considered a part of title 39. In cases where the Code presents ambiguities, it is most

¹⁹ For example, section 302(c)(1)(D)(ii) states that Congress strongly encourages the Postal Service to "keep unions, management associations, and local elected officials informed as an essential part of this [streamlining] effort and abide by any procedural requirements contained in the national bargaining agreements." 120 Stat. 3219.

instructive to look to the source that is always considered legal evidence of laws: the Statutes at Large.²⁰

An examination of the Statutes at Large reveals that the PAEA contains both freestanding provisions and amendatory provisions that make changes to positive law titles of the United States Code (such as title 39 and title 5). The House Office of the Legislative Counsel's Guide to Legislative Drafting explains the distinction between the two types of provisions:

Material that is being added to an existing statute is shown in quotation marks. As a shorthand, drafters often speak of freestanding material (whether an entire bill or a freestanding portion of a bill that also amends existing law) as being "outside the quotes" and the material being added as being "inside the quotes". Even if all of the substantive provisions of a bill are inside the quotes, it will still have technical provisions that are freestanding, most notably amendatory instructions that indicate where in the existing statute the new material is to be placed.²¹

When Congress intended the PAEA to amend chapter 36 of title 39, United States Code, it used amendatory language to specifically direct that chapter 36 be amended. For example, section 301 of the PAEA, 120 Stat. 3218, demonstrates a clear intent to add a new subchapter VII to chapter 36 of title 39, by directing that "Chapter 36 of title 39, United States Code, as amended by this Act, is further amended by adding at the end the following:". This direction is followed by quoted material that Congress intended to be added to chapter 36. Indeed, the material added by section 301 appears in title 39, United States Code, as subchapter VII of chapter 36. In contrast, section 302 of the PAEA, 120 Stat. 3219, includes neither a direction to amend chapter 36 of title 39 nor quotation marks delineating material to be included in chapter 36. It is a

²⁰ As the Supreme Court has noted, "the very meaning of 'prima facie' is that the Code cannot prevail over the Statutes at Large when the two are inconsistent." *Stephan v. U.S.,* 319 U.S. 423, 426 (1943). *See also Pension Benefit Guaranty Corporation v. Scherling,* 905 F.2d 173, 174 (8th Cir. 1990).

²¹ House Office of the Legislative Counsel Guide to Legislative Drafting, available at http://www.house.gov/legcoun/HOLC/Drafting_Legislation/Drafting_Guide.html#VA.

freestanding provision of the PAEA, not a part of title 39. Hence, it appears as a Historical and Statutory Note to section 3691 but not as part of chapter 36 proper.

Absent an explicit direction by Congress to include language in the United States Code (*i.e.*, an amendatory provision), the location of that language in the United States Code cannot be construed as an expression of congressional intent.²² This is consistent with the general rule that where a "'change of arrangement' was made by a codifier without the approval of Congress, it should be given no weight."²³ Congress, as a body, does not determine the placement of statutory provisions in non-positive law titles of the United States Code. Rather, it has entrusted the Office of the Law Revision Counsel with the duty to classify newly enacted provisions of law to their proper place in the Code. 2 U.S.C. § 285b. But the Law Revision Counsel is "not empowered by Congress to amend existing law."²⁴ Consequently, the courts have largely concluded that the mere placement of a statutory provision in a Historical and Statutory Note

See In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation, 522 F.Supp.2d 557, 566 (S.D.N.Y.) 2006 ("In general, this Court does not give much weight to where a law is located within the United States Code in determining the meaning of a statute because Congress votes on particular bills rather than the United States Code. Indeed, the United States Code is maintained by the Office of the Law Revision Counsel of the United States House of Representatives and, if a section of the United States Code is in conflict with Statutes at Large, the latter governs." (citations omitted)); *Turner v. Glickman*, 207 F.3d 419, 429 (7th Cir. 2000) ("... the plaintiffs-appellants' argument as to the placement of Section 862a in Chapter 13 of Title 21 ignores Congress' actual role in the codification decision. Section 862a was not placed in the criminal code according to the specification of Congress; that decision was made by the Office of Law Revision Counsel. ...because Congress did not make the decision to place Section 862a in the criminal code, that placement is not evidence of Congressional intent to levy a criminal punishment.") (citations omitted).

²³ U.S. v. Welden, 377 U.S. 95, 98 (1964).

²⁴ Warner v. Goltra, 293 U.S. 155, 161 (1934) (finding that a change in location made by the compilers of the Code did not result in a change of meaning).

to a title of the United States Code (regardless of whether the title has been enacted into positive law) does not create a relationship between the note and the title.²⁵

The Privacy Act of 1974, Public Law 93-579, 88 Stat. 1896, provides a useful example of this principle. The Statutes at Large show that the Privacy Act contains a section 3 that expressly amends title 5, United States Code, and a freestanding section 7. Section 3 of the Privacy Act reads much like section 301 of the PAEA. It begins, "Title 5, United States Code, is amended by adding after section 552 the following new section:". That direction is followed by a quoted section 552a. Section 7, on the other hand, contains neither a direction to amend title 5 nor quoted material to be inserted in title 5. As a result, the material added to title 5 by section 3 appears as section 552a of title 5 and the freestanding provisions of section 7 appear as a note to the new section 552a. The new section 552a of title 5, United States Code (added by section 3 of the Privacy Act) includes a definition of the term "agency" that is limited to Federal agencies. Section 7 of the Privacy Act, on the other hand, refers to actions by a "Federal, State or local government agency." In considering whether section 7 of the Privacy Act applies to municipalities, the Seventh Circuit and the Eleventh Circuit found

²⁵ Director of Office of Thrift Supervision v. Ernst & Young, 786 F.Supp. 46, 55 (D.D.C. 1992) (explaining that the "Historical and Statutory Notes sections provide readers of the United States Code Annotated with information such as cites to legislative history, references to other statutes, and effective and termination dates of the statute's amendments," but "they are not substantive portions of the statute." (emphasis added)); Baez v. U.S., 715 F.Supp.2d 1165, 1177-178 (D. Or. 2010) (finding that the placement by the Law Revision Counsel of a provision of the Cuban Refugee Adjustment Act of 1996 (CAA) as a note to a provision of the Immigration and Nationality Act (INA) codified at 8 U.S.C. § 1255 does not clearly indicate Congressional intent to make the CAA part of 8 U.S.C. § 1255 and noting that "Even if Congress itself placed the CAA in a note following section 1255(a), that does not, without more, conclusively show that Congress meant for the CAA to become part of the INA."); Sanders v. Allison Engine Co., Inc., 703 F.3d 930, 939 (6th Cir. 2012) (relying on its conclusion that section 4(f) of the Fraud Enforcement and Recovery Act of 2009 "is not codified in the text of [31 U.S.C.] § 3729, and is instead in the historical and statutory notes accompanying the section" in determining whether a definition from § 3729 applied to section 4(f)); Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1251 (11th Cir. 2005) (determining that separate claims may be brought under the Alien Tort Claims Act and the Torture Victim Protection Act in part because the fact that the Torture Victim Protection Act appears as a note to title 28, United States Code, does not mean that the Torture Victim Protection Act is part of title 28); accord Belhas v. Ya'alon, 515 F.3d 1279 (D.C. Cir. 2008) (concurring opinion); U.S. v. One Big Six Wheel, 987 F. Supp. 169 (E.D.N.Y. 1997) (explaining that a "miscellaneous provision" of the Antiterrorism and Effective Death Penalty Act of 1996 was added as a note to "a preexisting section" of title 18, United States Code, but not to title 18 itself).

that section 3 and section 7 are distinct provisions of law, regardless of how they appear in the United States Code. ²⁶ As the *Gonzalez* court explained, "Section 3's subsequent codification at 5 U.S.C. § 552a and § 7's relegation to the 'Historical and Statutory Notes' in the same section of the Code cannot change the statute's meaning." *Gonzalez*, 671 F.3d at 662.

The text of the PAEA provides no evidence that Congress intended the text of section 302 to be added to chapter 36 of title 39, United States Code. To the contrary, where Congress intended to add text to chapter 36, it used amendatory language to achieve that goal. That the Office of Law Revision Counsel placed section 302 in a Historical and Statutory Note to chapter 36 must be treated as an editorial choice by a professional staff rather than a definitive expression of the intent of elected members of Congress to include section 302 in chapter 36.

It is ordered:

 The Motion of the United States Postal Service to Dismiss Complaint, filed in Docket Nos. C2013-3 through C2013-9, is granted.

²⁶ Gonzalez v. Village of West Milwaukee, 671 F.3d 649, 660-2 (7th Cir. 2012) and Schwier v. Cox, 340 F.3d 1284, 1288 (11th Cir. 2003); see also Ingerman v. Del. River Port Authority, 630 F.Supp.2d 426, 437-8 (D.N.J. 2009) and Dittman v. California, 191 F.3d 1020, 1029 (9th Cir. 1999). The Sixth Circuit appears to be alone among the Circuit Courts in its opinion that the definition of "agency" added to title 5 by section 3 of the Privacy Act applies to the freestanding provisions of the Privacy Act. See Schmitt v. City of Detroit, 395 F.3d 327 (6th Cir. 2005). A Seventh Circuit case cited by the Sixth Circuit, Polchowski v. Gorris, 714 F.2d 749 (7th Cir. 1983), spoke only to the definition of "agency" for purposes of 5 U.S.C. § 552a and did not address section 7 of the Privacy Act.

2. The Complaints filed in Docket Nos. C2013-3 through C2013-9 are dismissed with prejudice.

By the Commission.

Shoshana M. Grove Secretary